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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

WRIGHT MORROW, *Petitioner*,

vs.

FRANK SCOFIELD, Collector of Internal Revenue,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

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vs.

FRANK SCOFIELD, Collector of Internal Revenue,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Wright Morrow prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on December 12, 1940, affirming a judgment of the United States District Court for the Western District of Texas.

OPINIONS BELOW

The District Court delivered no opinion. The opinion of the Circuit Court of Appeals (R. 59) is reported at 116 Fed. (2d) 17.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 12, 1940 (R. 65). On December 27, 1940, a Judge of the Circuit Court of Appeals granted Petitioner's motion to extend until January 16, 1941, the time for filing a motion for rehearing (R. 67). The Motion for Rehearing, filed on January 15, 1941, was denied without opinion on February 1, 1941 (R. 74). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The documentary stamp tax title of the Revenue Act of 1926, as amended, requires the affixing of stamps to documents effectuating sales of lands, tenements or other realty.

The first question presented is whether the incidence of this tax is governed by the law of the State where the property is situated, so that Petitioner's assignments of oil and gas leases on lands in Texas must bear stamps, while identical assignments of leaseholds on lands in certain other states are not taxed; or is the incidence of the tax to be governed by federal or general law under which oil and gas leases and assignments thereof are not sales of lands, tenements or other realty.

If State law does govern the incidence of the tax, then are Section 800 and Schedule A-8 of the Revenue Act of 1926 (as amended) as applied in this case, unconstitutional and invalid because they levy an excise

tax which is not geographically uniform, as required by Article 1, Section VIII, Clause 1 of the Constitution of the United States?

STATUTES AND REGULATIONS

The controlling language of Section 800 and Schedule A-8 of Title VIII of the Revenue Act of 1926, as amended by Section 725 of the Revenue Act of 1932, is as follows:

> "Sec. 800. * * * there shall be levied, collected, and paid, for and in respect of the several * * * documents, instruments, matters, and things mentioned and described in Schedule A of this title, * * * the several taxes specified in such schedule. * * * "
>
> "8. Conveyances: Deed, instrument, or writing, * * * whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction. * * * "

These sections of the statute, as well as pertinent Treasury Regulations and rulings are set out in full in the Appendix, pages 17 to 18, infra.

STATEMENT

On July 31, 1935, Petitioner assigned to Stanolind Oil & Gas Company various oil and gas leaseholds covering lands in Texas and Louisiana for $19,717,500 and $2,125,039, respectively (R. 28). All of the leaseholds assigned were held under ordinary commercial

oil and gas leases, and it was stipulated that all leases and assignments, both as to Texas and Louisiana lands, were identical.[1]

Long continued Treasury Regulations construing Section 800, Schedule A-8 of the Revenue Act of 1926, as amended, (and the same language in earlier Acts) had provided that what constituted "lands, tenements and other realty" within the purview of the statute was to be determined by the law of the State in which the property was situated.[2] Carrying this out, it had been specifically ruled that oil and gas leases and assignments thereof covering lands in Texas should bear stamps,[3] while those on lands in Louisiana should not.[4]

To comply with these rulings, Petitioner purchased from Respondent, and affixed to the Texas assign-

[1]A specimen oil and gas lease and an assignment were attached to the stipulated facts (Exhibits A and B) as being typical of all such leases and assignments (R. 28, 31, 12 and 17).

[2]Regulations 71 was promulgated to enforce the stamp tax provisions of the Revenue Act of 1932. Article 84 thereof reads, "What constitutes 'lands, tenements and other realty' is determinable by the law of the State in which the property is situated." A short history of Section 800, Schedule A-8 of the Revenue Act of 1926, as amended by the Revenue Act of 1932, its predecessors and the earlier applicable Regulations will be found in the Appendix, p. 18.

[3]S. T. 868, 1937-2, C. B. 527. See Appendix, p. 19; See also, S. M. 4439, IV-2 C. B. 52.

[4]G. C. M. 913, V-2, C. B. p. 255. See Appendix, p. 21. By Act 205, approved July 5, 1938, the Louisiana Legislature provided, in effect, that oil and gas were real property subject to ownership in place; whereupon the Bureau ruled that oil and gas leases in Louisiana lands, executed after July 5, 1938, were subject to the documentary stamp tax; those executed prior to that date are exempt. G. C. M. 22,132, I. R. B. No. 27 (July 1, 1940), p. 23. See Appendix, p. 23.

ments, stamps in the amount of $19,715.50, but he affixed no stamps to the Louisiana assignments (R. 30).

Petitioner duly brought suit to enforce payment of a proper claim for the refund of the amount so paid for the stamps (R. 1). The trial court denied recovery (R. 47), and this decision was affirmed by the Fifth Circuit Court of Appeals (R. 65).

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the instruments by which Petitioner assigned oil and gas leaseholds covering lands in Texas were subject to the tax imposed by Section 800 and Schedule A-8 of Title VIII of the Revenue Act of 1926, as amended by Section 725 of the Revenue Act of 1932.

2. The Circuit Court of Appeals erred in holding that such taxing statutes—which, *in terms*, impose a tax upon any instrument "whereby any lands, tenements or other realty sold shall be granted, assigned, transferred or otherwise conveyed"—impose a tax upon any instrument which, in substance, transfers interests in realty.

3. The Circuit Court of Appeals erred in holding that Texas law should be applied in determining whether the assignments in question were subject to the tax, and in failing to construe such stamp tax statutes so as to give a uniform application to a nationwide scheme of taxation.

4. If Section 800 and Schedule A-8, Title VIII of the Revenue Act of 1926, as amended, require that the

incidence of the tax imposed thereby be determind by State law, then the Circuit Court of Appeals erred in failing to hold such statutes, as here applied, unconstitutional and invalid, in that they levy an excise tax which is not geographically uniform, as required by Article 1, Section VIII, Clause 1 of the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

The writ should be granted because the holding of the Court below conflicts with controlling decisions by this Court and with applicable decisions by other Circuit Courts of Appeal, and because the Court below decided an important question of federal law which has not been, but which should be, decided by this Court.

The opinion below (R. 59) is confusing and somewhat contradictory and the conflicts relied upon here will more clearly appear after an analysis of that opinion.

In ascertaining whether the statute applied to petitioner's transactions, only three questions were or could be presented for determination:[5]

(1) Was there a sale?

(2) Was the thing sold lands, tenements or other realty?

(3) Are questions 1 and 2 to be decided by refer-

[5]The controlling parts of Sec. 800, Schedule A-8 of the Revenue Act of 1926, as amended, are: "* * * deed, instrument or writing * * * whereby any lands, tenements or other realty sold shall be * * * conveyed. * * *"

ence to the law of the State where the property is situated, or by federal rule?

The taxing authorities clearly took the position that, since by the laws of Texas an oil and gas lease was the conveyance of land for an undeterminable period of time,[6] the Act applied, and they have consistently held that where State law is otherwise as to the interest conveyed by an oil and gas lease, the Act does not apply.[7] The authorities are clear that under federal or general law an oil and gas lease is not a conveyance of land.[8] Therefore by affirming a decision in favor of the Respondent on the merits, the Court below must necessarily have held that the law of Texas controlled the incidence of the tax, and that there had been a sale of lands, tenements or other realty. This is true even though parts of the opinion below may appear to state

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[6]Letter rejecting claim for refund (R. 45).

[7]The more important of the rulings are summarized in the Appendix, page 27. States where oil and gas leases are not subjected to the documentary stamp taxes provided by Schedule A-8 are Kansas, Oklahoma, West Virginia, and Louisiana (leases executed prior to July 5, 1938).

[8]Burnet v. Harmel, 287 U. S. 103; Ohio Oil Company v. Indiana, 177 U. S. 190; Walls v. Midland Carbon Company, 254 U. S. 300; West v. Kansas Natural Gas Company, 221 U. S. 229. The Bureau has recognized that under the federal rule an oil and gas lease is not a conveyance of realty. G. C. M. 913, V-2, C. B. 225, set out in Appendix, p. 21. In Burnet v. Harmel this Court said: "By virtue of the lease, the lessee acquires the privilege of exploiting the land for the production of oil and gas for a prescribed period; he may explore, drill, and produce oil and gas if found. * * * Thus tested, we find in the Texas leases no differences from those leases where the title to the oil and gas passes only on severance by the lessee. * * *."

that State law is not controlling, or that it is controlling only when, in the opinion of the Court, the State decisions or law are not unreasonable. The opinion concludes with this statement:

> "For if we concede that in different jurisdictions different views as to the legal effect of mineral leases may be reasonably entertained, it is quite plain we think that the holding of the Texas Courts that a mineral lease is a conveyance of an interest in land is not unreasonable, but quite reasonable, and that the affixing of stamps thereon is required."

Thus the Circuit Court's opinion differs from the Treasury Department's rule requiring absolute deference to State laws only in degree, but not in principle: the taxing authorities do not assume to determine whether a decision of the highest state court upon a question within its jurisdiction is reasonable or unreasonable, whereas the Court below did assume to pass upon this question and, finding the State rule reasonable, applied it even though it differed from the general or federal law. The inevitable effect of this decision, if it were allowed to stand without challenge, is discrimination among the States and lack of uniformity in the operation of a federal taxing act intended to have nation-wide application.

CONFLICTS

1. By holding that "reasonable" rules of State law controlled the incidence of this tax, the Court below reached a decision conflicting with the decisions of this Court in *Burnet v. Harmel*, 287 U.S. 103; *Lyeth v.*

Hoey, 305 U.S. 188, and *Morgan v. Commissioner*, 309 U.S. 78. The controlling principle of all three of these decisions is that "State law may control (the incidence of a federal tax) only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law," and that "in the absence of language evidencing a different purpose, it (a federal taxing act) is to be interpreted so as to give a uniform application to a nation-wide scheme of taxation." In the present case it is clear that the Act, neither by express language nor necessary implication makes its operation dependent upon State law,[9] and it is equally clear that if State law is to control, it will be impossible to give uniform application to this nation-wide scheme of taxation.

In the Harmel case the question was whether an oil and gas lease on Texas land effectuated a sale of property within the purview of the Capital Gain Section[10] of the Income Tax Title of the Act. This Court, although recognizing that under Texas law the lease was a sale of capital assets, refused, for the reasons above stated, to let that fact control the operation of the capital gain section and thereby bring about a lack of

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[9]See Weil v. United States, 115 F. (2d) 999 and Niagara Hudson Power Corporation v. Hoey, Collector, 117 Fed. (2d) 414, discussed in Conflict 2, page 11, infra.

[10]By Sec. 208(a)(1) Rev. Act of 1924 (26 U. S. C. A. Sec. 939), "The term 'capital gain' means taxable gain from the sale or exchange of capital assets * * *." By Sec. 208(a) of the 1924 Act "capital assets" means property held for more than two years excluding property included in the inventory and that held for sale in the business.

uniformity in the application of a federal taxing act throughout the United States.[11]

In the *Lyeth case* the question was whether the amount received in settlement of a will contest was acquired by inheritance so as to be exempt from federal income taxation, and this Court refused to apply the Massachusetts rule (where the settlement was made) that the amount received in settlement was not acquired by inheritance, saying:

> "Whether what an heir receives from the estate of his ancestor through the compromise of his contest of his ancestor's will should be regarded as within the exemption from the federal tax should not be decided in one way in the case of an heir in Pennsylvania or Minnesota and in another way in the case of an heir in Massachusetts or New York, according to the differing views of the state courts."

In the *Morgan* case this Court refused to be governed by the Wisconsin rule as to what constituted a general power of appointment in determining the incidence of the estate tax law.

In none of these cases did this Court make any inquiry as to whether the State rule was reasonable or unreasonable, but limited its inquiry to an ascertainment of the things which Congress intended to tax or exclude from taxation. Thus the actual decision of

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[11]In other situations when called upon to construe or apply State law, this Court has not hesitated in recognizing the Texas rule that an oil and gas lease is a sale of minerals. Waggoner Estate v. Wichita County, 273 U. S. 113; Group No. 1 Oil Corporation v. Bass, 283 U. S. 279.

the Fifth Circuit, as well as its attempt to substitute for the Treasury rule requiring absolute deference to State law, a rule requiring deference to reasonable rules of State law, conflicts with the controlling decisions of this Court.

2. The decision below conflicts with recent decisions by the Second Circuit Court of Appeals, construing and applying the Stamp Tax Title of the Revenue Act of 1926, as amended, in its application to the sale and transfer of stock certificates. These cases are *Weil v. United States*, 115 Fed. (2d) 999, and *Niagara Hudson Power Corporation v. Hoey, Collector*, 117 Fed. (2d) 414. Each of these cases dealt with Treasury regulations providing that the Stamp Tax Act was inapplicable to those transfers of securities which were effected "wholly by operation of law." Which "law" —State or Federal—was not designated. In the Weil case it was shown that under New York law the transfer of corporate securities from the Mortgage Commission of the State of New York and the Superintendent of Insurance of the State of New York, as liquidator of the New York Title & Mortgage Company, to the Trustee appointed by the New York Superior Court under the Schackno Act, were "wholly by operation of law;" but the Second Circuit held, citing *Burnet v. Harmel*, that the State law could not "determine what is a taxable transfer under the United States Statute." The Niagara case involved a consolidation under which, according to the New York law, securities held by the constituent corporations passed by operation of law to the new corporation. Again the Second Circuit Court of Appeals refused to permit the incidence of the fed-

eral taxing act to be controlled by State law, citing *Burnet v. Harmel, Lyeth v. Hoey*, and its own decision in the *Weil case supra*, as requiring such a holding. Both of these opinions by the Second Circuit Court of Appeals necessarily hold that there is nothing in the Stamp Tax Title of the Revenue Act of 1926, as amended, which either expressly or by necessary implication makes its operation depend upon State law. Thus these opinions clearly conflict with the opinion below which gives controlling effect to "reasonable" rules of State Law.

3. The Court below necessarily held that Petitioner's assignments were sales within the purview of the stamp tax section. This conflicts with the decision of this Court in *Burnet v. Harmel*, 287 U.S. 103. Harmel, upon receiving large bonuses for oil and gas leases on his Texas lands, reported the bonuses as gain from the sale of capital assets taxable at a lower rate than that prevailing with respect to ordinary income. The Fifth Circuit Court of Appeals, in reliance upon the Texas rule, held that a sale had been effected. In reversing, this Court said:

> "Moreover, the statute speaks of a 'sale,' and these leases would not generally be described as a 'sale' of the mineral content of the soil, using the term either in its technical sense or as it is commonly understood."

If an oil and gas lease does not accomplish a sale of lands, tenements or other realty, then the assignment of the lessee's rights, for a consideration, is not a sale of lands, tenements or other realty.

IMPORTANT FEDERAL QUESTION NOT HERETOFORE DECIDED BY THIS COURT

This Court has never been called upon to determine the application of Section 800, Schedule A-8 of the Revenue Act of 1926, as amended by the Revenue Act of 1932, or any of the preceding statutes taxing sales of land. This Court has frequently noted the differing rules of State law with respect to the nature of an oil and gas lease and the estate or license conveyed thereby.[12] This variation in State law[13] and the Treasury's long continued practice of giving controlling effect to these varying State rules in determining the application of this schedule emphasize the importance of the question here presented and show that it should be decided by this Court.

If State law is to be given controlling effect in determining what are sales and what constitutes lands, tenements or other realty, grave questions will be raised as to whether such a construction and application results in unequal and non-uniform taxation prohibited by Article 1, Section VIII, Clause 1 of

[12]Burnet v. Harmel, supra; Ohio Oil Company v. Indiana, supra.

[13]"This type of operative act (an oil and gas lease) has been held to be a deed, a lease, a sale, a license, and an optional contract, and the legal interest created by them has been held to be a profit a prendre, a corporeal hereditament, an incorporeal hereditament, an estate in land, not an estate in land, an estate in oil and gas, not an estate in oil and gas, a servitude, a chattel real, real estate, interest in land, not an interest in land, personal property, a freehold, a tenancy at will, property interest, and the relation of landlord and tenant." Summers, Oil and Gas, Per. Ed., Vol. 1, Para. 152, p. 371, et seq.

the Constitution. Everyone must agree that from a practical standpoint the rights granted by an ordinary commercial oil and gas lease are the same throughout the United States,[14] whether those rights be called by the State Courts an interest in realty, and the lease a sale thereof, or whether they be denominated as the mere grant of a privilege to explore and capture such minerals as may be found. And the imposition of a tax upon oil leases and assignments in one State, and the deliberate failure to impose the tax upon such instruments in other States,[15] clearly brings about the lack of geographical uniformity forbidden by the Constitution and the decisions of this Court in construing it.[16] On the other hand, unless this Court decides the basic question, there will continue to be a serious doubt as to the validity of the rules which the Treasury Department has over a long period of time applied in determining the application of this schedule, and this will necessarily result in confusion and much additional litigation, which must ultimately reach this Court for decision.

The opinion of the Court below in its use of the words "transfer" and "sale" on the one hand, and "interest in realty" and "lands, tenements or other realty," on

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[14]This was conceded by the Fifth Circuit Court of Appeals, see opinion R. 59, 65; Cf. Burnet v. Harmel, supra.

[15]Oil and gas leases are subject to the Schedule A-8 documentary stamp tax, under Treasury rulings, in all of the oil and gas states except Oklahoma, West Virginia, Kansas and Louisiana (as to instruments executed prior to July 5, 1938). See Appendix, p. 27.

[16]Bromley v. McCaughn, 280 U. S. 124; Knowlton v. Moore, 178 U. S. 41.

the other, as if they were synonymous, when clearly there are vital differences between *sale* and *transfer*, and between *interest in realty* and *lands, tenements or other realty*,[17] only adds to the existing confusion and affords another reason why this Court should take jurisdiction of and decide the basic question.

CONCLUSION

Wherefore, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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[17]These differences, as they pertain to this case, are stated in the Appendix at page 27.

APPENDIX

SECTION 1.

Statutes and Regulations Involved

Section 800 and Schedule A-8 of Title VIII of the Revenue Act of 1926, as amended by Section 725 of the Revenue Act of 1932, are as follows:

"Sec. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax."

"8. *Conveyances: Deed, instrument, or writing*, delivered on or after the 15th day after the date of enactment of the Revenue Act of 1932 and before July 1, 1934 (unless deposited in escrow before April 1, 1932), whereby any *lands, tenements, or other realty sold* shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direc-

tion, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 and does not exceed $500, 50 cents; and for each additional $500 or fractional part thereof, 50 cents. This subdivision shall not apply to any instrument or writing given to secure a debt." (Emphasis throughout supplied unless otherwise noted).

Regulations 71, promulgated to enforce the above statutory provisions, provide:

"Art. 79. 'Sold' defined.—The term 'sold' imports the transfer of the absolute or general title for a valuable consideration or price."

"Art. 84. *What constitutes real property determinable by law of State where located.*—(a) What constitutes 'lands, tenements or other realty' is determinable by the law of the State in which the property is situated. Standing timber is ordinarily held to be real estate and where so held the deed transferring it is subject to the tax."

"Art. 108. *Leases on real property.*—Leases on real property are not subject to the tax."

SECTION 2.

Short History of Statutes Requiring Documentary Stamps on Conveyances of Land

(Referred to in Note 2)

The Stamp Tax on conveyances of land, tenements or other realty was first introduced into our taxing acts by the War Revenue Act of June 13, 1898 (1939-1 C B (Part 2) page 16); similar taxes were imposed

by various acts down to and including the Revenue Act of 1914. In 1918 a stamp tax on such conveyances was provided for in language identical with the stamp tax statute in effect at the time this case arose. Title XI, Sec. 1100, Schedule A-7 of the Revenue Act of 1918. The statute as thus written was carried forward in the 1924 Act as Schedule A-5. This provision of the 1924 Act was repealed without substitution by the 1926 Act, but was added as Section 800, Schedule A-8 by Section 725 of the 1932 Act. Article 84 of Regulations 71 (1932 Act), defining lands, tenements or other realty according to State law, was first promulgated as a regulation construing the Act taxing conveyances of realty in 1924 as Article 29 of Regulations 55. Article 84 is a verbatim reproduction of Article 29.

SECTION 3.

(Referred to in Note 3)

S. T. 868, 1937-2 C. B. p. 527:

"Advice is requested whether the instruments hereinafter described conveying certain interests in oil and gas covering lands situated in Kansas and Texas are subject to the stamp tax on conveyances imposed by Schedule A-8 of Title VIII of the Revenue Act of 1926, as added by section 725 of the Revenue Act of 1932.

The law imposes a stamp tax on any "* * * Deed, instrument, or writing * * * whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers * * * when the consideration or value of the interest or property conveyed, exclusive of the value of any

lien or encumbrance remaining thereon at the time of sale, exceeds $100 * * *." What constitutes "lands, tenements, or other realty" is determinable by the law of the State in which the property is situated. (Article 84, Regulations 71).

The following described instruments covering lands in Kansas and Texas are involved:

1. *Sale of oil and gas royalty.*—The grantor for a specified consideration grants, sells, conveys, assigns and delivers to the grantee forever an undivided interest in and to all of the oil, gas, and other minerals that may be produced from certain designated lands, together with the right to drill and explore such lands for oil and gas and other minerals and remove the same therefrom, subject to the terms of an existing oil and gas lease covering such lands, the grantee to receive all royalties, money rentals, and bonuses payable under such lease.

2. *Mineral deed.*—The provisions of this instrument are in all material respects the same as those set forth in (1).

3. *Sale of oil and gas royalty.*—The only material difference between this instrument and that described in (1) is that its duration is for a term of years and as long thereafter as oil and/or gas is produced from the property or the propetry is being developed or operated. * * *

* * * * *

In Texas oil and gas are subject to ownership in place (Mills and Wellingham, Law on Oil and Gas, section 35). In *Sheffield v. Hogg, et al.*, and *Federal Royalty Co. v. State* (77 S. W. (2d) 1021), the Supreme Court of Texas held that the lessor's in-

terest in the minerals and royalties under various kinds of oil and gas leases covering lands in Texas constituted real estate.

In view of the foregoing, it is held that each of the instruments in question constitutes a conveyance of realty subject to stamp tax under Schedule A-8 of Title VIII of the Revenue Act of 1926, as added by section 725 of the Revenue Act of 1932."

SECTION 4.

(Referred to in Notes 4 and 8)

G. C. M. 913, C. B. V-2, p. 255:

"The question involved is as to whether instruments which purport to convey the absolute right to oil and gas in place, in Louisiana, or which purport to lease property in that State with the attendant right to extract such oil and gas from the soil and convert the same to the use of the lessee, are "conveyances of land, tenements, or other realty" within the meaning of Schedule A-5 of the Revenue Act of 1924, under the provisions of which there is imposed a stamp tax on instruments granting, assigning, transferring, vesting, or otherwise conveying real property.

Since under the provisions of Schedule A-5 of the Revenue Act of 1924 the stamp tax is imposed upon instruments effecting the conveyance of realty, in order to determine if oil and gas leases are to be taxed under this title it is first necessary to determine if by the terms of such instruments there are in fact conveyances of realty. In passing upon questions of this nature the Bureau has taken the position that what constitutes real prop-

erty is a matter to be determined by reference to the law of the State in which the property is situated. (Art. 29, Regulations 55, 1924 edition). It is, therefore, necessary to have recourse to the substantive law of the State of Louisiana, and in so doing, since it is found that the Louisiana Code is silent on the subject, the answer to the proposition presented must be secured as a result of a review of the decisions of the Louisiana courts. * * *

It would seem beyond doubt that the Supreme Court of Louisiana has definitely determined the jurisprudence of that State as being that oil and gas in place are not subject to absolute ownership as specific things apart from the soil of which they form a part; and a grant or reservation of such oil and gas carries only the right to extract the minerals from the soil, which is an incorporeal right, and, therefore, personal property. It is likewise clear that the Supreme Court of Louisiana has determined that the assignment of such a grant or reservation is not a conveyance of real property. * * *

* * * * *

The nature of the property interests in an oil and gas lease or a conveyance of oil and gas in place in the State of Louisiana seems to be settled by the decisions of the Louisiana Supreme Court as referred to above. Those decisions may be stated as being to the effect that there is no such property right in oil or gas in place as may be the subject of a conveyance, and, further, that a grant of such oil or gas, or a lease of land for the purpose of extracting such oil or gas, is at most a grant of the right to extract such minerals from the soil and

not a conveyance of real estate. The Supreme Court of the United States has indicated conclusions to the same effect in construing statutes relative to oil and gas in other jurisdictions. (Ohio Oil Co. v. Indiana, 177 U.S. 190, 20 Supreme Court 576). It has also been held by the Supreme Court of the United States with respect to the property interests in a lease of a mine as follows:

> "The propriety of a lease for the purpose of developing and working mines is recognized by all the cases and the rule established by the great weight of authority that such leases do not constitute a sale of any part of the land."

(Von Baumbach v. Sargent Land Co., 242 U.S. 517, which was in affirmation of the decision of the Supreme Court of Minnesota in the case of State v. Evans, 99 Minn. 220, 98 N.W. 958). * * *

For the reasons stated above, this office is of the opinion that instruments which purport to convey the absolute property right to oil and gas in place in Louisiana, or which purport to lease property in that State with the attendant right to extract such oil and gas from the soil and convert the same to the use of the lessee, are not conveyances of realty within the meaning of Schedule A-5 of the Revenue Act of 1924, and, accordingly, are not subject to the stamp tax imposed thereunder."

A. W. GREGG,

General Counsel, Bureal of Internal Revenue.

G. C. M. 22,132, I R B No. 27 (July 1, 1940) p. 23:

"An opinion is requested whether the instruments hereinafter described affecting oil, gas, and

other minerals, and rights thereto, located in and under lands situated in Louisiana constitute conveyances of realty subject to stamp tax under section 3482 of the Internal Revenue Code, as amended by section 1 of the Revenue Act of 1939.

The following types of instruments are presented:

(1) A mineral deed;

(2) A lease or royalty deed of indefinite duration (such as those containing the usual "thereafter" clause whereby the lessee or grantee may explore for and extract oil and/or gas for a definite period and "thereafter as long as oil and/or gas is produced");

(3) A royalty deed of unlimited duration;

(4) Assignments of the foregoing instruments;

(5) A royalty deed for a limited period, i.e. having a fixed time for termination. * * *

It was held in G. C. M. 913 (C. B. V-2, 255 (1926) (syllabus) that—Instruments which purport to convey the absolute property right to oil and gas in place in Louisiana, or which purport to lease property in that State with the attendant right to extract such oil and gas from the soil and convert the same to the use of the lessee, are not conveyances of realty within the meaning of Schedule A-5 of the Revenue Act of 1924, and are not subject to the stamp tax imposed thereunder.

Act No. 205 of 1938 (Louisiana), approved July 5, 1938, provides in part as follows:

> Section 1. * * * That oil, gas and other minerals leases, and contracts applying to and af-

fecting such leases or the right to reduce oil, gas or other minerals to possession, together with the rights, privileges and obligations resulting or flowing therefrom, are hereby defined and classified as *real rights and incorporeal immovable property*, and may be asserted, protected and defended in the same manner as may be the ownership or possession of other immovable property by the holder of such rights, without the concurrence, joinder or consent of the landowner, and without impairment of rights of warranty, in any action or by any procedure available to the owner of immovable property or land.

Section 2. That this act shall apply to all such transactions whether entered into prior to the passage of this Act or not.

Act. No. 205, supra, defines and classifies "mineral leases, and contracts applying to and affecting such leases or the right to reduce oil, gas or other minerals to possession, together with the rights, privileges and obligations resulting or flowing therefrom, * * * as real rights and incorporeal immovable property * * *." The purpose of the statute was to overcome the effect of the decision of the Supreme Court of Louisiana in *Gulf Refining Company of Louisiana v. Glassell, et al.*, (171 So. 846, 180 La. 190) that the holder of a mineral lease had not a "real right" in the leased land and therefore could not institute successfully a petitory or possessory action. (Allison v. Maroun, 190 So. 408; 193 La. 286). * * *

The effect of Act No. 205, supra, was to place the leasing of the right referred to above in the same category as a sale or reservation of the right.

The question then arises whether such real right in the land or right of servitude on the realty is within the meaning of the phrase "lands, tenements, or other realty" as used in section 3482, supra. In this connection it is to be observed, as heretofore pointed out, that under the present status of the Louisiana law a mineral deed and a mineral lease are in the same category for the purpose of determining this question. * * *

In view of the foregoing, it is the opinion of this office, that, under the laws of Louisiana, mineral deeds which convey the absolute property right to oil, gas, or other minerals; oil, gas or other mineral leases or royalty deeds of indefinite duration (such as those containing the usual "thereafter" clause); royalty deeds of unlimited duration; or an assignment of any of the foregoing instruments, constitute conveyances of realty subject to stamp tax under section 3482 of the Internal Revenue Code, as amended; and that a royalty deed of limited duration with respect to such minerals is a chattel real or personal property and is not taxable as a conveyance of realty.

G C M 913 (C. B. V-2, 255 (1926)) is revoked in so far as it applies to oil, gas or other mineral deeds, and its application to oil, gas, or other mineral leases is limited to such leases as were executed prior to the effective date of Act No. 205 of 1938, supra."

J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue.

SECTION 5.

(Referred to in Notes 7 and 15)

In the following States oil and gas leases and various instruments pertaining to the mineral estate are excluded from the operation of Section 800, Schedule A-8 of the Revenue Act of 1926, as amended: Oklahoma, G. C. M. 21,702, 1939-2, C. B. 383; Kansas, S. T. 872, 1938-1, C. B. 546; West Virginia, G. C. M. 14348, XIV-1, C. B. 427; and, until July 5, 1938, Louisiana, G. C. M. 913, V-2, C. B. 255, and G. C. M. 22,132 No. 27 I. R. B. (July 1, 1940), page 23. Indiana probably falls within this category.

In other States oil and gas leases and similar instruments are subjected to the operation of the documentary Stamp Tax Act: Arizona, Nebraska and South Dakota, S. T. 881, 1939-1 (Part 1), C. B. 359; Arkansas, G. C. M. 16,510, XVI-1, C. B. 416; California, G. C. M. 16,934, XV-2, C. B. 364; Kentucky, S. T. 794, XIII-2, C. B. 418; Illi,-nois S. T. 881, 1939-1 C. B. 359; Iowa, S. T. 888, 1939-2 C. B. 380; Pennsylvania, G. C. M. 17,026, C. B. Dec. 1936, p. 366.

SECTION 6.

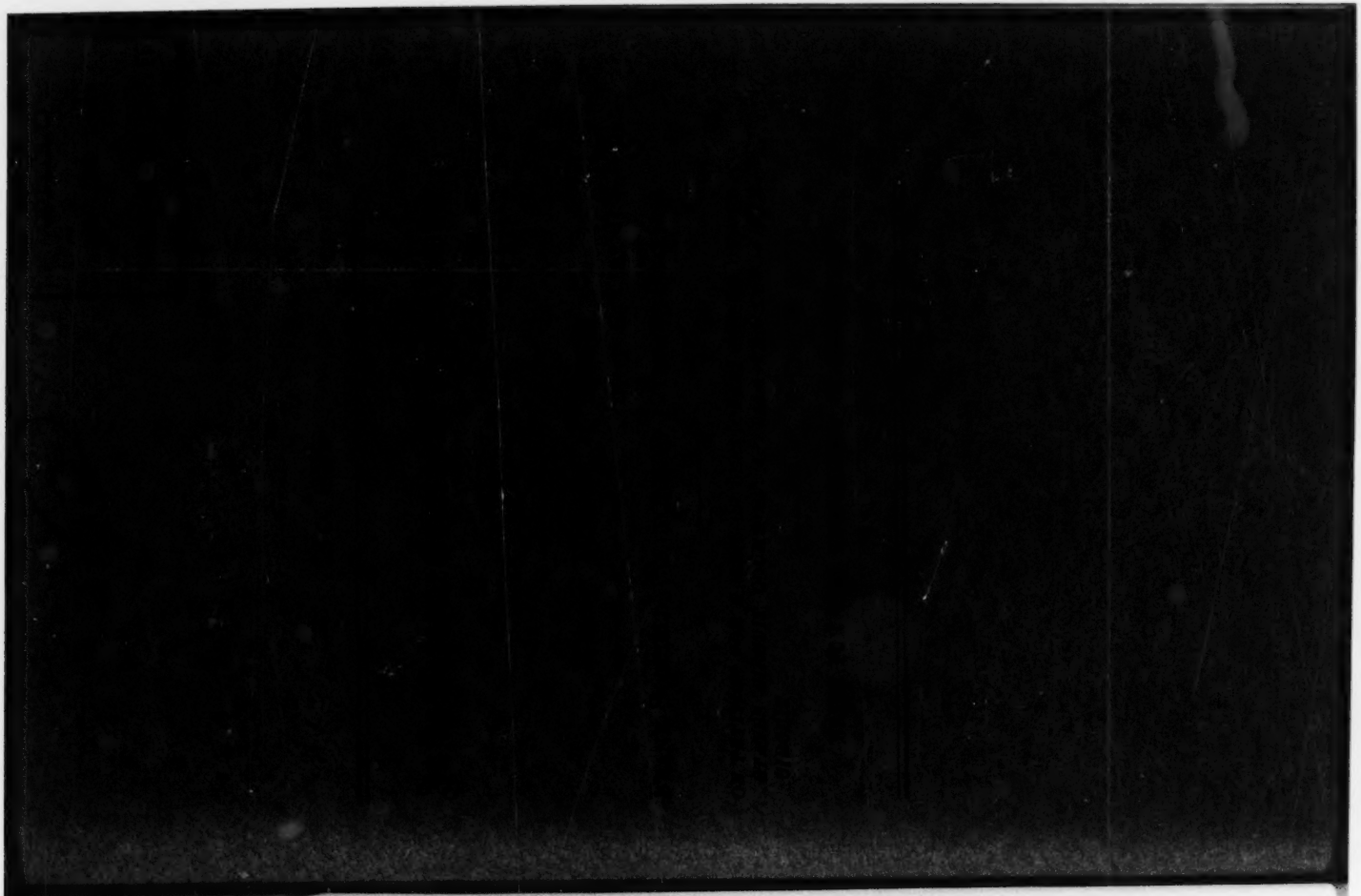
(Referred to in Note 17)

Differences between *Interests in realty* and *Lands, Tenements or other Realty:*

An interest in realty is far more inclusive than "lands, tenements or other realty." A lien, a lease for a term of years, a profit *a prendre*, a right of way, an easement, a contract to purchase or sell

lands, an inchoate right of dower, ground rights, water rights, and other rights and privileges pertaining to land are "interests in realty." (Words & Phrases, Vol. 22, pp. 63-76). Yet, since 1918, the Treasury Department has consistently ruled that "leases on real property are not subject to the tax" (Art. 108, Reg. 71); it is ruled that a sale "imports the transfer of the absolute or general title" (Art. 79, Reg. 71); that "no tax is imposed upon an option for the purchase of real property or upon a contract for the sale of real property" (Art. 91, Reg. 71); that a conveyance of the inchoate right of dower, prior to assignment thereof, is not subject to stamp tax (Art. 84 Reg. 71); it has been ruled that a fifty year mining lease is not subject to the tax (S. T. 54, Sales Tax Rulings Jan.-June, 1921, p. 87).

In Oklahoma an oil and gas lease is "interest in realty" (Commissioner v. McKinney, C C A 10, 87 Fed. (2d) 811; Danciger Oil & Refining Company v. Burroughs, C C A 10, 75 Fed. (2d) 855), but the Bureau of Internal Revenue has uniformly ruled that the execution and delivery of such a lease is not a sale of lands, tenements or other realty. G. C. M. 21,702, 1939-2, C. B. 383. The same is true with respect to West Virginia, Kansas and, until July 5, 1938, Louisiana. See Section 5 of this Appendix, p. 27. The Bureau has in general been guided by the following ruling: "The term 'lands, tenements or other realty' as used in this statute clearly means that estate or interest in lands known as real property, which must be an estate for life or a greater estate. Any less estate, as for a number of years, does not amount to a fee but is a chattel real or personal property." G. C. M. 11,732, C. B. XII-1, p. 439.



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312223—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 925

WRIGHT MORROW, PETITIONER

v.

FRANK SCOFIELD, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court delivered no opinion. The opinion of the Circuit Court of Appeals is reported at 116 F. (2d) 17 (R. 59).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 12, 1940 (R. 65). A petition for rehearing filed by the taxpayer on January 15, 1941, within the time extended by a Judge of the Circuit Court of Appeals (R. 66), was denied without opinion on February 1, 1941 (R. 74). The petition for a writ of certiorari was

filed on April 5, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an instrument transferring all right, title and interest in and to oil and gas leaseholds is subject to the documentary stamp tax provided for in Section 800, Schedule A–8, of Title VIII of the Revenue Act of 1926, as amended, which imposes a tax upon deeds or instruments in writing "whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed * * *."

STATUTES AND REGULATIONS INVOLVED

Pertinent statutes and regulations are set forth in the Appendix, *infra,* pp. 8–10.

STATEMENT

The facts were stipulated (R. 27–46) and found as stipulated (R. 47). They may be summarized as follows:

Petitioner, a resident of Houston, Texas, was the owner of certain oil and gas leases on lands located in Texas (R. 28). On July 31, 1935, he sold these leases to the Stanolind Oil & Gas Company for $19,717,500 (R. 28–29). The transfer of the leases was evidenced by a general conveyance (Ex. B–1, R. 31–33), which included prop-

erty other than the leases, and by a number of written assignments of which Exhibit A–2 (R. 17–18) is typical. The pertinent provision of the typical assignment reads as follows (R 17):

> That Wright Morrow, of Houston, Texas, for and in consideration of the sum of Ten ($10.00) Dollars and other valuable considerations, paid by Stanolind Oil and Gas Company, a Delaware corporation, the receipt of which is hereby acknowledged, does hereby sell, transfer, assign, set over, grant and convey unto said Stanolind Oil and Gas Company, its successors and assigns, all of the oil and gas lease acreage described in the schedule which is attached hereto, made a part hereof and marked for identification as Schedule "A" * * *.

The petitioner purchased revenue stamps from the respondent in the amount of $19,107.50 and attached them to the general conveyances to cover the tax, imposed by Section 800, Schedule A–8, of Title VIII of the Revenue Act of 1926, as amended, upon the sale of the Texas oil and gas leaseholds (R. 30). On February 18, 1936, petitioner filed a claim for refund for the purchase price of the stamps, plus interest (R. 30). Upon rejection of the claim by the Commissioner (R. 31), this action was brought in the District Court for refund of the taxes (R. 1). The trial court denied recovery (R. 47–48) and its decision was affirmed by the court below (R. 65).

ARGUMENT

1. Proceeding on the premise that the court below held that State law determines the applicability of the stamp tax to the instruments of transfer, petitioner asserts a conflict with *Burnet* v. *Harmel,* 287 U. S. 103, *Lyeth* v. *Hoey,* 305 U. S. 188, and *Morgan* v. *Commissioner,* 309 U. S. 78, as well as with *Weil* v. *United States,* 115 F. (2d) 999 (C. C. A. 2d) and *Niagara Hudson Power Corp.* v. *Hoey,* 117 F. (2d) 414 (C. C. A. 2d), both now pending on petitions for certiorari, Nos. 916 and 871, present Term. Petitioner's premise, however, is utterly without foundation. The court below, far from holding that state law controls the incidence of the tax, expressly rested its decision upon the proposition that instruments like those here involved do transfer interests in "lands, tenements, or other realty" within the meaning of the statute, regardless of whether, under local law, oil and gas leaseholds are held to be a conveyance of title to the real estate. The court stated (R. 61):

> * * * The Texas decisions aside, and they are uniform to the effect that mineral leasehold interests are interests in lands, tenements or other realty, we think the comprehensive language of the federal statute makes it quite plain that it was the intention of Congress to require the affixing of stamps to instruments of this kind, instruments which in substance convey interests in lands,

tenements or other realty without regard to the particular legal effects and consequences which may be attached to them by the laws of a particular state.

2. It is true, as petitioner points out, that Article 84 of Treasury Regulations 71 provides that "What constitutes 'lands, tenements, or other realty' is determinable by the law of the State in which the property is situated." The court below, although indicating its view that this regulation was not to be applied literally to the facts here presented, held that, whether so applied or not, the same result must be reached. The decision below was that, as a matter of statutory construction, and without regard to the classification given the transfer by Texas law, the stamp tax applies to an assignment of an oil and gas lease as an instrument whereby "lands, tenements, or other realty sold [are] granted, assigned, transferred or otherwise conveyed * * *." Precisely the same conclusion follows, as the court below pointed out, if Texas law is deemed determinative, for under Texas law it is plain that an assignment of a mineral lease is a conveyance of an interest in land. Consequently, irrespective of the weight given to the characterization of the transaction under state law, the stamp tax is applicable. See *Milwaukee Land Co.* v. *Poe,* 31 F. (2d) 733 (C. C. A. 9th).

3. The decision below is not contrary to the statement in *Burnet* v. *Harmel, supra,* to the effect that

oil and gas leases are not sales of the mineral content of the soil within the meaning of the capital gains provisions of the income tax laws. The *Harmel* case involved oil and gas leases made by the owner in fee of oil lands; the lands were retained by the lessor and the issue was simply whether the leases constituted sales of the oil and gas in place. Here, on the other hand, petitioner was a lessee, rather than a lessor, and assigned his leasehold interests to another. The question is not whether by virtue of the lease petitioner had purchased, and by virtue of the assignment of the lease had sold, the oil and gas in place, but whether the assignment of the leasehold interest constituted a sale of an interest in realty. On that question the record is conclusive. The assignments provided (R. 17), "That Wright Morrow * * * does hereby sell, transfer, assign", etc., and the parties stipulated (R. 28–29), that by the execution of the instruments of assignment, petitioner

> *sold*, transferred, assigned, set over, granted and conveyed to Stanolind Oil & Gas Company * * * all of his right, title and interest in and to the aforesaid oil and gas leaseholds covering lands located in the States of Texas and Louisiana. [Italics supplied.]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
RICHARD H. DEMUTH,
CARL J. MAROLD,
Special Assistants to the Attorney General.

APRIL, 1941.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax. (U. S. C., Title 26, Secs. 900, 908.)

Schedule A–8 of Title VIII, Revenue Act of 1926, as amended by Section 725 of the Revenue Act of 1932, c. 209, 47 Stat. 169:

> 8. *Conveyances:* Deed, instrument, or writing, delivered on or after the 15th day after the date of the enactment of the Revenue Act of 1932 and before July 1, 1934 (unless deposited in escrow before April 1, 1932), whereby any lands, tenements, or other realty sold shall be granted, assigned,

transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 and does not exceed $500, 50 cents; and for each additional $500 or fractional part thereof, 50 cents. This subdivision shall not apply to any instrument or writing given to secure a debt.

Treasury Regulations 71 (1932 Edition):

ART. 75. *Who shall affix stamps.*—The Act requires that the person who makes, signs, or issues any instrument taxable thereunder shall affix and cancel the revenue stamps. It also prohibits any person from accepting such instruments unless they are properly stamped.

ART. 84. *What constitutes real property determinable by law of State where located.*—(a) What constitutes "lands, tenements, or other realty" is determinable by the law of the State in which the property is situated. Standing timber is ordinarily held to be real estate, and where so held the deed transferring it is subject to the tax.

(b) In States where common-law dower still exists an instrument purporting to convey the inchoate right of dower of a wife or the consummate right of dower of a widow, prior to assignment of dower, is not subject to stamp tax; but an instrument conveying the estate acquired by a widow upon assignment of dower is subject to tax. Where by statute dower has been abolished and a different interest in the husband's real property conferred upon the wife in lieu

thereof, the taxability of an instrument purporting to convey such an interest prior to its assignment will be determined by the nature of the wife's interest, and the statutes and decisions of the particular State in which the real estate is located must be consulted.

U. S. GOVERNMENT PRINTING OFFICE: 1941